CRAWFORD v. HEATWOLE & HEDRICK.

Nov. 18, 1909.

[66 S. E. 46.]

1. Damages (§ 79*)—Stipulation as to Amount of Damages for Breach of Contract—Validity.—Parties to a contract may stipulate in advance as to the amount to be paid for a breach thereof when the damages resulting from a breach are uncertain and difficult of ascertainment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164-169; Dec. Dig. § 79.*]

2. Damages (§ 80*)—Stipulation for Breach of Contract—Validity.—A contract for the construction of a $5,400 dwelling on a $1,600 lot stipulated for a payment of $10 per day as damages for each day the building remained incomplete after a specified date. The owner and his wife were living in a boarding house, and particularly desired to occupy their own home. Held, that the contract stipulated for reasonable damages on failure to complete the building within the time fixed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 173; Dec. Dig. § 80.*]

Error to Circuit Court, Rockingham County.

Action by Heatwole & Hedrick against one Crawford. There was a judgment for plaintiffs and defendant brings error. Reversed and remanded.

Jas. B. Stephenson and *D. O. Dechert,* for plaintiff in error.
Roller & Martz, for defendants in error.

WHITTLE, J. This motion was brought by the defendants in error, Heatwole & Hedrick, against the plaintiff in error, Crawford, upon a building contract bearing date July 25, 1907.

The agreement contained a stipulation for the completion of the dwelling "not later than January 1, 1908, and, in the event that the said residence is not fully completed by that date, then * * * the parties of the second part are to pay to said party of the first part $10 per day for each day that said residence remains incomplete, the aforesaid sum being by way of damages, the same being agreed to by all parties to this contract." There was a further provision that, if the weather was such that the work could not be carried on to advantage so as to insure "a first-class job," the contractors were not to be charged with time so lost.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

The building was not completed until March 7, 1908, and the defendant, having paid into court the amount admitted to be due, withheld the sum of $660 as liquidated damages.

The trial court instructed the jury that the sum agreed on as damages constituted a penalty and was not recoverable, which ruling presents the only question which demands our consideration.

The house was constructed as a habitation for the defendant and his family at a total cost of $7,000—$1,600 for the lot and $5,400 for the building—and the rental value was estimated at $35 per month. It also appears that the defendant urged as a special reason why the building should be completed within contract time that his wife, to whom he had been recently wedded, was in a delicate condition, that they were living in a boarding house, and particularly desired to occupy their own home.

The general rule is well settled that parties to a contract may stipulate in advance as to the amount which shall be paid in compensation for loss or injury which may result from a breach of the agreement, if such breach should occur, when the damages are uncertain and difficult of ascertainment.

In 1 Sutherland on Dam. (3d Ed.) § 279, it is said: "As a general rule, when the injury resulting from the breach of a contract is susceptible of definite measurement, as where the breach consists in the nonpayment of money, the parties will not be sustained in the enforcement of stipulations for a further sum, whether in the form of penalty or liquidated damages; but, where the damages sustained are uncertain and are not readily susceptible of being reduced to a certainty by legal computation, they may be determined before a breach occurs."

This general statement of the rule is in accord with the trend of judicial thought and decision.

"The question whether a sum named in a contract to be paid for a failure to perform," says Earl, J., in Kemp *v.* Knickerbocker Ice Co., 69 N. Y. 45, "shall be regarded as stipulated damages or a penalty, has been frequently before the courts, and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they have made for themselves. Courts of law have in some cases assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount stipulated as liquidated damages would be grossly in excess of the actual damages, they have learned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have learned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental

rule, so often announced, is that the construction of these stipulations depends in each case upon the intent of the parties as evidenced by the entire agreement construed in the light of the circumstances under which it was made."

The opinion of Mr. Justice White on this subject in Sun Printing & Publishing Association *v.* Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366, will be found to be instructive. He summarizes the governing principle as follows: "Damages are deemed liquidated at the stipulated sum when the actual damages contemplated at the time the agreement was made are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount fixed is not on the face of the contract out of all proportion to the probable loss. * * * If a construction of an agreement be doubtful, that construction must be adopted which makes the covenant most beneficial to the promisee."

Sutherland, at section 284, commends this decision, which he says "puts agreements for the liquidation of damages upon substantially the same footing as other contracts in which fraud, surprise, or mistake has not entered."

On the same subject (section 291, pp. 761, 762) the learned author says: "Damages for failure to complete a house or any other structure may sometimes be ascertained proximately by a rental standard. But where intended for a particular purpose other than to be rented, and when delay may hinder or thwart other and dependent contracts or enterprises, the damages will be more uncertain. In a building contract containing the usual clauses fixing the days for completing the various parts of the work a stipulation to the effect that any neglect to comply with the conditions of the contract and finish the work as provided should entitle the employer to claim damages at the rate of $10 per day for every day's detention so caused was held a covenant for stipulated damages."

Numerous cases from courts of last resort of the States and Canada are cited in support of the text, though the author adds: "There are authorities to the effect that the damages ordinarily resulting from the failure to fulfill a building contract which contains only the usual conditions are not so uncertain as to be the subject of such stipulations, the extrinsic circumstances not being unusual; but the decisions are far from being unanimous on the question." After citing authorities in support of the minority rule, or rather the qualification of the general rule, the author adds: "But see Ward *v.* Hudson River B. Co., 125 N. Y. 230, 26 N. E. 256; Sun Printing & Pub. Ass'n *v.* Moore, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366. With the exception of the decision in Welch *v.* McDonald, 85 Va. 500, 8 S. E. 711 (where it

was held that a stipulation in a building contract for the payment of $5 per day as damages for delay in completing a house worth $750 was stipulated damages and not a penalty), the Virginia cases dealing with conventional liquidations are not pertinent and need not be reviewed."

The case in judgment comes well within the general rule laid down by Mr. Sutherland. The intention of the parties to fix in advance the compensation to be paid by way of damages for a breach of contract should such breach occur with respect to the time within which the house was to be completed is unmistakable. The building was not intended for rental purposes, but for a home, and consequently the estimated rental value affords no just criterion for the measure of damages. Considered in connection with the cost of the property, the stipulated damages cannot be regarded as either unconscionable or unreasonable. Superadded to the difficulties in the way of estimating with approximate precision the damages usually inhering in this class of contracts, the condition of the defendant's wife and the circumstances in which they were placed by the delay render it all the more difficult to calculate the damages by marketable values.

From these considerations, it follows that the judgment must be reversed, and the case remanded for a new trial.

Reversed.

Note.

The question involved in the principal case is one of growing importance, and seems to have been dealt with by our court only once before, namely, in the case of Welch *v.* McDonald, cited by the court in its opinion. The opinion of Judge Whittle in this case is a gem of conciseness and clearness, and might serve as a model and an example of how an important question can be fully dealt with in a reasonable space. In speaking of the vast accumulation of cases, and how bewildering it is to one searching for authorities, the following suggestion is made by the author of an interesting article in the "Columbia Law Review" entitled "The Law Reforms of Jeremy Bentham:"

"It may be suggested that this latter evil may be re nedied by greater condensation and brevity of opinions, but the power of clear and condensed statement in the individual is a rare gift. We must not overlook, too, the crowded dockets of our courts, the lack of time for condensation; nor may we ignore the prevailing use of stenography by our judges, as it is a matter of familiar knowledge that dictation without ample time for revision does not tend to conciseness of statement."

But our court seems to be rarely gifted in this respect, and their opinions are usually as brief as can be expected.

To come back to the annotation, we will preface it by saying that our citations are confined to cases in which the agreement was a building contract as in the principal case, and the question for decision was whether it provided for a penalty or liquidated damages.

It was said in an early Virginia case that "the law relative to liquidated damages has always been in a state of great uncertainty. This has been occasioned by judges endeavoring to make better con-

tracts for parties than they have made for themselves." Ould v. Myers, 23 Gratt. 403.

Construction of Contract.—Where from the nature of a contract the damages cannot be calculated with any degree of certainty, the stipulation will usually be held to be liquidated damages, where they are so denominated in the instrument itself. Schroeder v. California Yukon Trading Co., 95 Fed. 296; North v. O'Hara, 73 Ill. App. 691; Leveitt v. Bolton, 102 Ill. App. 582; Steer v. Brown, 106 Ill. App. 361; McCullough v. Moore, 111 Ill. App. 545; Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; Chicago, etc., R. Co. v. McEwen, 71 N. E. 926, 35 Ind. App. 251; Merica v. Burgett, 36 Ind. App. 453, 75 N. E. 1083; Garst v. Harris, 177 Mass. 72, 58 N. E. 174; Calbeck v. Ford, 103 N. W. 516, 140 Mich. 48; May v. Crawford, 150 Mo. 504, 51 S. W. 693; Peekskill, etc., R. Co. v. Village of Peekskill, 165 N. Y. 628, 59 N. E. 1128; Santa Fe R. Co. v. Schutz, 37 Tex. Civ. App. 14, 83 S. W. 39.

But it is not intended by the above statement of the rule to lay down that the language of the parties to the contract and the terms employed descriptive of the amount to be paid are conclusive of the interpretation and legal effect of the contract, for just the contrary is true. In short, though the word "penalty" be used, the sum so termed may be deemed liquidated damages where it is fixed upon by the parties as the measure of damages.

Thus, a stipulation in a contract that, in case of a failure to deliver an engine on a certain day, defendant would "pay as forfeit $5 per day for every day behind this time," was intended to provide for liquidated damages, and was not designed as a penalty notwithstanding the words "as forfeit." Hardie Tynes Foundry & Machine Co. v. Glen Allen Oil Mill, 36 So. 262, 84 Miss. 259.

Likewise, provision in a contract for construction of a sewer for a city, under the head, "Penalty for Noncompletion of Work," that, if the work is not completed by the stipulated time, the contractor shall pay the city $10 a day while in default, as liquidated damages for the delay, and also the cost to the city of engineering, inspection, and superintendence during the default, is, as to the $10 a day, not a penalty, but a proper stipulation as to damages. Lamson v. City of Marshall, 95 N. W. 78, 10 Detroit Leg. N. 200, 133 Mich. 250.

A provision in a contract by which a subcontractor agreed with the contractor to complete a certain portion of a building by a certain time, and "to pay the sum of $150 per day as a penalty for each and every day thereafter that the said work remains unfinished, as and for liquidated damages," is an agreement for liquidated damages; and therefore the contractor is not restricted to damages proved to have been actually sustained by a delay. Kunkle v. Wherry, 42 A. 112, 189 Pa. 198, 69 Am. St. Rep. 802.

On the other hand it has been held that whatever may be the law in a case where a building contract contemplates the actual removal of the family to the premises, and there is a stipulation for possession at a given date, and a certain amount stated as "liquidated damages" in case of failure to deliver, only actual damages can be recovered for the breach of a bare contract to have a house done by a given date, without regard to the use for which it is intended. Simon v. Lanius, 9 Ky. Law Rep. (abstract) 59.

Rule Where Contract Is Severable.—Where a contract contains several stipulations, for the breach of some of which the damages would be uncertain, and for the breach of others certain and susceptible of easy proof, a sum mentioned in the contract to secure the performance thereof will be regarded as a penalty and not as liquidated damages. East Moline Co. v. Weir Plow Co., 95 Fed. 250, 37

C. C. A. 62; Steer *v.* Brown, 106 Ill. App. 361; Merica *v.* Burgett, 36 Ind. App. 453; St. Louis, etc., R. Co. *v.* Shoemaker, 27 Kan. 677; Berry *v.* Wisdom, 3 O. St. 241.

Thus, where the party claiming liquidated damages for delay in the completion of a building contract is himself responsible for a part of the delay, there can be, it has been held, no apportionment of the liquidated sum, as such liability must be enforced in its entirety, if at all. Wills *v.* Webster, 1 N. Y. App. Div. 301.

Statement of General Rule.—Where a building contract provides that the contractors shall pay to the owner, by way of liquidated damages, a certain sum for every day the buildings shall remain incomplete after the day fixed for their completion, the provision will be enforced, in the absence of anything to show that it is unreasonable, harsh, or oppressive, or that the amount stipulated is greatly in excess of a fair rental value of the premises upon the completion of the houses. Emack *v.* Campbell, 14 App. D. C. 186; Carter & Co. *v.* Kaufman, 45 S. E. 1017, 67 S. C. 456; Louis *v.* Brown, 7 Or. 326; Pettis *v.* Bloomer, 21 How. Prac. 317.

Because damages for delay in the completion of a house have been held, in accordance with the decision in the principal case, to be so uncertain that a stipulation to pay a certain sum indicates an intention to agree upon a fixed measure of damages, and not to pay such sum as a penalty merely. Hennessy *v.* Metzger, 152 Ill. 505, 43 Am. St. Rep. 267; Hall *v.* Crowley, 5 Allen (Mass.) 304, 81 Am. Dec. 745.

Where the parties to a building contract stipulated that time should be of essence of the contract, and agreed that, if the work should not be completely finished at a certain time, the contractor should forfeit and pay as liquidated damages a certain sum for each day the building remained unfinished, the stipulation of the parties will be enforced. Downey *v.* O'Donnell, 86 Ill. 49.

A provision of a building contract, authorizing the owner to deduct from any sums due the contractor a stipulated sum as liquidated damages, and not as a penalty, for each day's delay in the completion of the work beyond a date fixed, is valid, and conclusively furnishes the measure of the owner's damages on account of such delay. Stephens *v.* Essex County Park Commission, 143 F. 844, 75 C. C. A. 60.

A building contract provided that neglect to comply with its conditions and to complete a building as stipulated would entitle the employer to damages at the rate of $10 for each day's delay occasioned thereby. Held, that the amount specified was not in the nature of a penalty, but stipulated damages, which plaintiff was entitled to recover for breach of the contract. O'Donnell *v.* Rosenberg, 4 Daly, 555, 14 Abb. Prac. (N. S.) 59.

A building contract provided that the contractor covenanted to complete the work on a certain day, and for his failure, to pay the owner $10 a day after such date, during which the work remained unfinished as "fixed, ascertained and liquidated * * * actual damage which the owner will sustain by such delay." The contract price of the building was $19,700, and a witness testified that the fair rental value of the premises was $4,000 a year. The contractor delayed for 197 days the completion of the contract, during which the owner was wholly deprived of all income from the property. Held, that the contract provided for liquidated damages, and not for a penalty. Couch *v.* Newtown Council Bldg. Ass'n, 96 N. Y. S. 441, 109 App. Div. 856.

Where a contract provided that a house should be completed by a certain date, and that five dollars should be forfeited as liquidated damages for each day's delay thereafter, and there was unnecessary

and unwarranted delay in completing the house, it was error to disallow such liquidated damages. Young *v.* Gaut, 61 S. W. 372, 69 Ark. 114.

Plaintiffs contracted with R. to erect a building, and have it ready on or before a certain date, and to let the building to them for a term of years, which contract stipulated that he should pay them $50 for each day after the date named for the performance, "as fixed, settled, and liquidated damages" which they "will sustain by reason of the failure * * * to complete said building" within the time specified. Held, that the amount stipulated was liquidated damages, and not a penalty. Judgment (1898) 51 N. Y. S. 1140, 28 App. Div. 622, reversed. Curtis *v.* Van Bergh, 55 N. E. 398, 161 N. Y. 47.

In a contract to complete a grand stand for a race course by a designated day, the contractor agreed to pay the owner $100 a day for every day that he should be in default after the day stated, which sum was thereby agreed upon as the damages which the owner would suffer by reason of such default, and not by way of penalty. Held, that the sum of $100 a day was liquidated damages. Monmouth Park Ass'n *v.* Wallis Iron Works, 55 N. J. Law (26 Vroom) 132, 26 Atl. 140, 19 L. R. A. 456.

In a contract for building a vessel, it was stipulated that, if it was not completed by a specified date, defendant was to pay therefor to plaintiffs at a certain rate per month for any delay in its completion after that time; and the parties bound themselves to the faithful performance of the contract in a specified sum. Held, that the damages for such delay were liquidated by the agreement. Curtis *v.* Brewer, 34 Mass. (17 Pick.) 513.

A contract for the purchase of machinery to be erected on defendant's premises provided that in case the turbines were not completed by October 1, 1896, plaintiffs would pay defendant, as liquidated damages, $100 per day for each day beyond that time both turbines should remain uncompleted, and $50 for each day either one should remain uncompleted. Held, that such stipulated damages could not be construed as a penalty, and hence plaintiffs could not defeat or reduce the recovery thereof by showing that defendant sustained no actual loss by the delay. Wood *v.* Niagara Falls Paper Co., 121 F. 818, 58 C. C. A. 256.

Where plaintiff was to manufacture and deliver to defendant certain machinery at a time and place specified at a specified price, and on failure to deliver at such time, and place $50 was to be deducted from the contract price for each day's delay, the deduction was in the nature of liquidated damages, and not a penalty. Wheeling Mold & Foundry Co. *v.* Wheeling Steel and Iron Co., 51 S. E. 129, 58 W. Va. 62.

Where a contractor undertakes the construction of a public building, and stipulates for the completion of his contract within a stated time, agreeing to pay a given sum, as rent, for each week between such stated time and the time when the building is actually completed and delivered, if the sum so stated be not disproportionate to the inconvenience which would be occasioned by such delay, and which must have been within the contemplation of the parties when the contract was executed, and is not otherwise unreasonable or unjust, it will be regarded as liquidated damages, and is recoverable as such. Heard *v.* Dooly County, 28 S. E. 986, 101 Ga. 619.

A contract for furnishing a criminal court room provided for $10 liquidated damages for each day's delay in completing it after a certain time. The jail was in the same building, and prisoners would have to be taken a mile back to the old court room, and no other place

could be obtained for a court room; and the extent of the delay and loss occasioned thereby could not be accurately calculated. Held, that the damages stipulated were liquidated, and not a penalty. Harris County *v.* Donaldson, 48 S. W. 791, 20 Tex. Civ. App. 9.

A contract for constructing a building for the known intended use as a home for aged men, and located so as not to be available to rent, and providing, for delay in completing the building after a certain time, that "the contractor shall pay to the owner $10 for every day thereafter that the said work shall remain unfinished, as and for liquidated damages," and that if the contractor by delay cause any damage for which the owner shall become liable he shall make good to the owner "any such damage over and above any damage for general delay herein otherwise provided," is for the court to construe, and is properly construed to provide for liquidated damages, rather than a penalty. Kelly *v.* Fejervary (Iowa), 78 N. W. 828.

Where a contract for the erection of a store building provided for $20 damages for every day's delay in performance beyond a certain date, and the actual damages from delay, consisting of losses of profits in the conduct of the business, were incapable, or extremely difficult, of calculation, the provision is one for liquidated damages, and not for a penalty. Neblett *v.* McGraw & Brewer, 91 S. W. 309.

Where a building contract providing that, in case of delay, the contractor shall pay to the owner $10 per day for every day after that named for completion of the work "as liquidated damages," contained no provision from which it could be determined whether the parties intended such sum to be liquidated damages or a penalty, the usual technical meaning of such term will be applied to it, in the absence of a contrary showing; the burden being on the contractor, in the action to recover the amount retained by the owner under such clause, to show that the same was a penalty. Kelly *v.* Fejervary, 83 N. W. 791, 111 Iowa, 693.

This case is absolutely on all fours with the principal case, even to the exent of details. The owner withheld from the contract price the sum of $660 as liquidated damages for which recovery was sought by the contractor, as was true in the principal case. The report of the case, however, does not show what the original price agreed upon for the construction of the building was.

Contracts Construed to Provide for a Penalty.—But where a contract provides that, in case of neglect or failure to complete a house on or before a date agreed upon, "there shall be deducted the sum of $25 per day, in the discretion of the secretary of the Smithsonian Institution," and the deduction made by him is not based upon actual damages, but in pursuance of an alleged right to enforce the forfeiture, it is a case of penalty, and not of liquidated damages. Haliday *v.* United States, 33 Ct. Cl. 453.

Where a contractor agrees "to forfeit the sum of $20 per day for each and every day's delay," "the amount thereof to be deducted from any sum which may be due him," the provision will be regarded as penalty, and not as liquidated damages. L. P. & J. A. Smith Co. *v.* United States, 34 Ct. Cl. 472.

A contract for the construction and delivery of two engines recited that the purchaser was desirous that the contract should contain a penalty in the way of stipulated damages, and provided that one of the engines should be delivered on the 1st of April, and the other on the 1st of May, and the manufacturer agreed to pay, as liquidated damages for any delay in delivery after the 1st of April as to the first engine, and after the 1st of May as to the second, the sum of $50 per day for all time which the delivery should be delayed after May 1st.

The purchaser made a payment on the contract price after the default, without informing vendor that he intended to claim the $50 per day as liquidated damages. Held, that the agreement stipulated for a penalty, and not liquidated damages, and could not be enforced. Judgment (1898) 77 Ill. App. 59, reversed.—Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 54 N. E. 987, 181 Ill. 582.

Reasonableness of Stipulation with Respect to Amount.—The rule is well settled that the stipulated sum must be reasonable in amount, or at least not manifestly "unconscionable or unreasonable," to use the language of Judge Whittle in the principal case. If the sum named is wholly disproportionate to the actual damages sustained the courts will deem the parties to have intended to stipulate for a mere penalty to secure performance, and not for a liquidation of the damages. Or the state the rule in another way the courts will refuse to depart from the rule of actual compensation, where this can be ascertained. Steer *v.* Brown, 106 Ill. App. 361; Weedon *v.* American Bonding and Trust Co., 38 S. E. 225, 128 N. C. 69.

Thus, a stipulation in a building contract providing that the contractor shall forfeit $10 for each day after a certain day that the building, contracted to be built for $6,900, remains uncompleted, will be treated as a penalty, where there is a failure to show that any damages actually resulted from such delay. Connelly *v.* Priest, 72 Mo. App. 673.

Where a contract for the construction of a church for the sum of $3,400 provided that the contractor should pay $3 a day for delay after a certain date, such stipulated damages were so grossly disproportionate to the probable value of the use of the building that the owners would only be entitled to recover damages actually sustained. Zimmerman *v.* Conrad, 74 S. W. 139.

A builder contracted to complete plaintiff's house on a certain date, the contract providing that, in case of default the builder should pay $10 for every day thereafter that the building remained unfinished, as liquidated damages. The contract price for the building was $1,600. The builder defaulted, and after notice to defendant, the surety of the builder, plaintiff completed the building. The rental value of the building when completed was but $30 per month. Held, that the forfeiture provided in the contract so greatly exceeded the actual damages that it should be considered a penalty, though stated to be liquidated damages, and plaintiff should recover only actual damages. Weedon *v.* American Bonding and Trust Co., 38 S. E. 255, 128 N. C. 69.

Though a building contract provided for $5 per day as liquidated damages for each day the house remained incomplete after the time specified for completion, in an equity case the provision could not be treated as one for liquidated damages, where the building was constructed for rental purposes, and its rental value did not exceed $25 per month. Coen & Conway *v.* Birchard, 100 N. W. 48, 124 Iowa 394.

But a stipulation in a building contract that the contractor should pay $10 per day as liquidated damages for delay in completing the building within the specified time is not unreasonable, and will be upheld where it is shown that the rental value of the building was $300 per month. Ramlose *v.* Dollman, 73 S. W. 917, 100 Mo. App. 347.

Fifty dollars per day, stipulated as the damages for delay in the construction of a church, is not greatly disproportionate to the loss that may result therefrom, and hence may be recovered as liquidated damages therefor. Bird *v.* Rector, etc., of St. John's Episcopal Church of Elkhart, 56 N. E. 129, 154 Ind. 138.

Where a contract for the erection of a hospital building costing

$24,000 stipulated for the payment of liquidated damages of $20 for each day the building should remain unfinished after a certain time, the actual damage was so difficult of ascertainment, and the stipulated sum bore such a just relation to the damage reasonably to be anticipated, that the agreement should be regarded as one for liquidated damages, and not a penalty. Davis *v.* La Crosse Hospital Ass'n, 99 N. W. 351, 121 Wis. 579.

In a contract for the manufacture and delivery of church pews, a provision for a forfeiture of $10 per day for delay in delivery after a certain date is not unreasonable, and will be enforced as liquidated damages. Illinois Cent. R. Co. *v.* Southern Seating and Cabinet Co., 58 S. W. 303, 104 Tenn. 568, 50 L. R. A. 729.

The fact that there is no market rental value for a house in the town where it is situated does not show that the owner has sustained no damage from the contractor's failure to complete it within the time stipulated in his contract, so as to render a provision in the contract for a certain sum for each day's delay void as a penalty. Brown Iron Co. *v.* Norwood, 69 S. W. 253.

But in another case it is held that where a building contract provided for the payment of $5 per day as liquidated damages for each day it remained unfinished after the contract time, and the evidence showed that there was no market rental value for such a house in the town, the court could not presume that the difference between the actual damage and the amount stipulated was so great as to make the latter amount a penalty. Brown Iron Co. *v.* Norwood, 69 S. W. 253.

Definiteness of Stipulation.—But if the provision for stipulated damages is indefinite or doubtful, it should not be enforced. Thus where an agreement in a building contract provided that, if the builder should fail to deliver all material or to perform all of the services contracted for, the other party should make deductions from the contract price *for all material not delivered or services not rendered by the last day of the time fixed for the completion of the work*, the agreement is so uncertain as to the manner in which the percentage is to be computed as to justify a holding that the provision referred to did not constitute an agreement to pay stipulated damages. Robertson *v.* Village of Grand Rapids, 104 N. W. 715, 96 Minn. 69.

Right to Recover Actual Damages.—Where the contract for the erection of a building provides liquidated damages for delay in completion, the owner is properly refused permission to show actual damage for such delay. Smith *v.* Vail (1900), 65 N. Y. S. 834, 53 App. Div. 628, affirmed. Ludlum *v.* Vail, 59 N. E. 1125, 166 N. Y. 611.

Waiver.—Moving into a house before repairs are complete is no waiver of a right to liquidated damages for delay in completion. Horton *v.* Tobin, 20 Nova Scotia 169, 8 Can. L. T. 377. But a contrary view was taken in the very similar case of Collier *v.* Betterton, 87 Tex. 440, wherein it was held that damages at the stipulated rate were recoverable only from the time when the building should have been completed to the time when the owner entered it, and thereafter only the actual damages for delay. See also Truin-Bambrick Const. Co. *v.* Ft. Smith, etc., R. Co., 140 Federal Reporter 465.

Admissibility of Evidence.—Evidence of conversations had at the time of making the contract and just previous to the execution thereof between the parties and their agents, is admissible to explain what was intended by the expression "liquidated damages" as used by the parties, since such evidence does not tend to contradict the instrument. Kelly *v.* Fejervary, 111 Iowa 693, 83 N. W. 791.

But in an action by a builder against his employer on a special

contract for building a house, evidence that an amount of 10 per cent. on the contract price, stipulated to be forfeited if the house was not finished at a certain day, was intended by the parties as liquidated damages, and not as a penalty, is inadmissible. Van Buren *v.* Digges, 52 U. S. (11 How.) 461, 13 L. Ed. 771.

DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

PENDLETON *v.* COMMONWEALTH.

Sept. 16, 1909.

[65 S. E. 536.]

1. Taxation (§ 59*)—Personal Taxation—Liability.—The liability to personal taxation is determined not by one's citizenship, but by his residence, and hence in deciding such question whether or not he has relinquished his citizenship in the manner provided by Code 1904, § 40, is immaterial.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 59.* 13 Va.-W. Va. Enc. Dig. 101, et seq. 14 id. (Supt.) 1001.]

2. Taxation (§ 20*)—Personal Tax—Nonresident.—The state has no jurisdiction to assess a tax as a personal charge against a nonresident, nor as a general rule can the personalty of a nonresident be taxed unless it has an actual situs within the state.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 51-54; Dec. Dig. § 20.* 13 Va.-W. Va. Enc. Dig. 101, et seq. 14 id. (Supt.) 1001.]

3. Domicile (§§ 2, 4*)—Change—"Residence"—"Domicile."—The words "residence" and "domicile" are not convertible terms, the latter being a word of more extensive signification, and including, beyond mere physical presence at the particular place, positive or presumptive proof of an intention to make it a permanent abiding place; yet where a party is already abiding at a particular place while his domicile is elsewhere, and while so abiding he forms an intention to make it his home permanently, or for an indefinite period, and continues to abide there pursuant to such purpose, he thereby acquires a new domicile.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 2, 5-23; Dec. Dig. §§ 2, 4.* 3 Va.-W. Va. Enc. Dig. 113, et seq.

For other definitions, see Words and Phrases, vol. 3, pp. 2168-2179; vol. 8, pp. 7641, 7642; vol. 7, pp. 6151-6161; vol. 8, p. 7788.]

---

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.